No. 3546

In Equity

In the

United States

Circuit Court of Appeals

For the Ninth Circuit

THE WASHINGTON WATER POWER COMPANY
a Corporation Appellant

vs.

KOOTENAI COUNTY, A Municipal Corporation, W. A. THOMAS as Treasurer and Ex-Officio Tax Collector of Kootenai County, Idaho, and C. O. SOWDER, Clerk of the District Court and Ex-Officio Auditor and Recorder of Kootenai County, Idaho, and C. O. SOWDER and W. A. THOMAS, Individuals, Appellees.

Brief of Appellant

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Press Publishing Co., Coeur d'Alene, Idaho

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STATEMENT

The substance of the complaint may be briefly stated as follows:

The jurisdiction of the Federal Court was invoked upon two grounds: (a) That the suit involved a construction of the "equal protection" and "due process of law'' provisions of the Fourteenth amendment; and (b) Upon the ground of diversity of citizenship.

That plaintiff owned an electric power plant in Kootenai County, Idaho and power transmission lines and municipal distribution systems in various counties in Idaho;

That the State Board of Equalization of Idaho had assessed plaintiff's property for the year 1918 at $2,750,000, which sum was in excess of the full cash value of the property at that time;

That prior to said assessment, the plaintiff had filed with the State Board of Equalization full reports, disclosing its property, the value thereof, the income and operating expenses thereof as required by the laws of the state;

That at the meeting of the State Board of Equalization at which said assessment was to be made, plaintiff appeared by its counsel, and its auditor and there called attention to the value of its property, as set forth in said reports, and in addition thereto presented the opinion and judgment of the Public Utilities Commission of the State of Idaho, rendered about two months prior to the meeting of the board of equalization. The Utilities Commisiion had valued the property of the company in the State of Idaho for rate making purposes as of the 31st day of December, 1917, which was but a few days prior to the date as of which the board of equalization was charged with the duty of assessing it, to-wit, the second Monday of January, 1918;

That the said decision of the Public Utilities Commission showed the value of the property of the plaintiff in Idaho to be not in excess of the sum of $2,438,978;

That in addition thereto plaintiff owned a distribution system in the City of St. Maries, Idaho, which had not been valued by the Utilities Commission, the reproduction cost of which was $43,000 and its actual value $31,461.

Counsel for plaintiff called attention of the board of equalization to the fact that assessors in the State of Idaho charged with the duty of assessing all property, except the property of public utilities, were not assessing property at in excess of 50 per cent of its full cash value, and that the Washington Water Power Company demanded that its property be assessed upon the same basis and by the same rule.

The complaint further charged that the total value of the operating property of the plaintiff in the State of Idaho on the second Monday in January, 1918, was not in excess of the sum of $2,470,439 and the cost of reproduction new was not in excess of the sum of $3,384,413.

The complaint charged that systematically, generally, intentionally and habitually the county assessors of the State of Idaho and the County Boards of Equalization had assessed and permitted to be assessed the property within their sphere of duty at not to exceed 50 per cent of its full cash value, and that for the year 1918 the property assessed within the sphere of duty of the local assessors had not been assessed at to exceed 50 per cent of its full cash value as the result of an understanding between said assessors and said State Board of Equalization.

The complaint specifically charged that for the year 1918,

the property assessed by the County assessor in Kootenai County was assessed at less than 50 per cent of its full cash value generally, intentionally and systematically.

That the assessment so made by the State Board of Equalization imposed upon the plaintiff in the County of Kootenai an unjust and undue burden, and that the State Board of Equalization did not assess it at 50 per cent of its full cash value, but at 100 per cent thereof and more.

The complaint charged that the understanding with reference to the assessment of property for the year 1918 at not to exceed 50 per cent of its full cash value was repeatedly referred to in the open meeting of the State Board of Equalization and was within the knowledge of all of the members thereof;

That the assessment of the property within the sphere of duty of the local county assessors at 50 per cent of its value had been permitted intentionally and systematically to stand by the said Board of Equalization for years and was so knowingly and intentionally permitted to stand in the year 1918;

That the defendant county and its officers proceeded to collect taxes against the plaintiff upon said 100 per cent valuation assessed by the State Board of Equalization on its property;

That the plaintiff tendered taxes upon 55 per cent of said valuation; that said tender had been refused; that the plaintiff offered in court to pay the same and further to give such security in money, liberty bonds or other security as the court might

direct to secure the defendant county against any loss for any sum which might be awarded to it;

That the county officers issued a delinquency certificate; that said delinquency certificate claimed a 6 per cent penalty and in addition thereto a penalty of 1 per cent per month.

The prayer was that the court ascertain and determine the taxes due upon the property of the plaintiff for the year 1918; that upon payment thereof the defendant county and its agents be required to accept said sum and to enter said taxes against said property on the books of the county as fully paid and that all taxes in excess of the sum of $23,080.84, which was 55 per cent of the tax so levied, be declared null and void and all penalties be declared null and void.

THE ANSWER.

The answer consisted of a specific denial of the allegations of the complaint.

THE ASSESSING POWER IN IDAHO AND THE CONSTITUTION AND STATUTES OF IDAHO GOVERNING THE ASSESSMENT OF PROPERTY.

An understanding of the questions presented demands a brief statement of the manner in which property is assessed in Idaho:

(a) The property of public utilities is assessed by the State Board of Equalization.

(b) All other property is assessed by the county assessor of the county wherein it is situated.

(c) The County Board of Equalization is charged with

the duty of equalizing the assessments in its county so made by the county assessor.

(d) The State Board of Equalization is charged, in addition to its duty in assessing utilities, with the further duty of equalizing the valuation of property throughout the state, so originally made by the assessors.

A proper understanding of the questions to be presented requires that some of the constitutional and statutory provisions of the state be referred to, and so much thereof as may be deemed necessary to a decision of the case are here set forth.

IDAHO CONSTITUTION.

Article 7, Section 2 of the Idaho Constitution provides as follows:

> "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her, or its property, except as in this article hereinafter otherwise provided. The legislature may also impose a license tax (both upon natural persons and upon corporations, other than municipal, doing business in this state); also a per capita tax; PROVIDED, The legislature may exempt a limited amount of improvements upon land from taxation."

Article 7, Section 5 of the Idaho Constitution is as follows:

> "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal: Provided, That the legislature may allow such exemptions from taxation from time to time as shall seem

necessary and just, and all existing exemptions provided by the laws of the territory, shall continue until changed by the legislature of the state."

IDAHO STATUTES: All references are to the sections of the Idaho Compiled Statutes of 1919.

Section 3097. Assessable Value: Lien of Taxes.

"All real and personal property subject to assessment and taxation must be assessed at its full cash value for taxation for state, county, city, town, village, school district and other purposes, under the provisions of this chapter, with reference to its value at 12 o'clock meridian, on the second Monday of January in the year in which such taxes are levied, and all taxes levied under the provisions of this chapter, shall be a lien upon the property assessed, and a lien upon any other property of the owner thereof, and all taxes levied upon improvements shall be a lien upon the land upon which the same stand, except as otherwise provided in this chapter, which several liens attach as of the second Monday in January in said year, and shall only be discharged by the payment, cancellation or rebate of the taxes as provided in this chapter."

Section 3104. Value defined.

"By the term 'value', 'cash value' or 'full cash value' is meant the value at which the property would be taken in payment of a just debt due from a solvent debtor, or the amount the property would sell for at a voluntary sale made in the ordinary course of business, taken into consideration its earning power when put to the same uses to which property similarly situated is applied."

Section 3109. Property assessable in county.

"All property shall be assessed by the assessor of the county in which it is situated, except as in this chapter otherwise provided."

Section 3110. Criteria of value.

"In ascertaining the value of any property the asses-

sor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation, nor shall he adopt as a criterion any value or price for which the property would sell at auction or at forced sale, or in the aggregate with all the property in the taxing district; nor, on the other hand, shall he adopt a speculative valuation, or one based upon sales made upon the basis of a small cash payment, and instalments payable in the future, but he shall value each article or piece of property by itself and at such sum or price as he believes the same to be fairly worth in money at the time such assessment is made."

Section 3171. Equalization by Classes.

"The state board of equalization shall equalize the assessments of property throughout the state, by classes, as shown by the abstracts transmitted by the several county auditors, county by county. In such equalization the said board shall have power to increase the total value of any class of property in any county as shown by the abstract from that county, when in the opinion of the said board the value of that class, appearing in such abstract, is not just and equal as compared with the value of other classes of property in that county, or the value of property in other counties, because of its being less than the full cash value, as determined by such comparisons, and the said board shall have power to decrease the total value of any class of property in any county as shown by the abstracts from that county when, in the opinion of the said board, the value of that class, appearing in such abstract, is not just and equal as compared with the value of other classes of property in that county, or the value of property in other counties, because of its being in excess of the full cash value, as determined by such comparison."

Section 3172. Equalization of aggregate values.

"The state board of equalization shall have power to add to, or deduct from, the aggregate value of all property in any county as shown by the abstract of assessment, such percentage of such aggregate value as may be necessary, in the opinion of the said board, to establish uni-

formity and equality of values among the several counties in the state."

Section 3173. Limitations on equalization of classes.

"All increases or decreases made in equalizing among classes or counties must in all cases be by whole percentages, and not fractional percentages. The result of all changes made in equalizing among the several counties of the state, must not increase or decrease the sum of the total valuations of the several counties, as shown by all the abstracts of assessments, by an amount exceeding 15 percentum of such sum of total valuations."

Section 3175. Criterion of value for equalization.

"The valuations of all property which, according to the provisions of this chapter, shall be exclusively assessed for taxation by the state board of equalization, shall be equalized in relation to the valuation of other property in the state, according to its full cash value."

OPERATING PROPERTY OF PUBLIC UTILITIES.

Section 3183. Operating property assessable by state board.

"The operating property of all railroads, telegraph, telephone and electric current transmission lines, and the franchises of all persons owning, or operating as lessees, or constructing any telegraph, telephone or electric current transmission line, or railroads, wholly or partly within this state, shall be assessed for taxation for state, county, city, town, village, school district and other purposes, exclusively by the state board of equalization.."

Section 3189. Manner of Assessment: Valuation.

"The state board of equalization must assess all property which, under the provisions of this chapter, is to be assessed by it, at the meeting of the said board convening on the second Monday of August in each year, and must complete the assessment of such property on the fourth Monday of August in that year. The said board shall, at such meeting ascertain and determine the full cash value

of all such property in the state, except electric current transmission lines, and shall determine the total value, the number of miles and value per mile of each railroad, telegraph and telephone line in the state, the value, number of miles, and value per mile of such line in any county into or through which the said line extends, and the value, number of miles and value per mile, of such line in any incorporated city, town, village, school district, or other taxing district into or through which the said line extends. The value per mile of any line except electric current transmission lines, is to be determined by dividing the total value of such lines within the state by the number of miles of such line within the state.

The said board shall at such meeting ascertain and determine the full cash value of the electric current transmission lines in each county separately, and shall determine the total value, the number of miles and value per mile of each electric current transmission line in each county into or through which said line extends, and the value, number of miles and value per mile of such line in any incorporated city, town, village, school district or other taxing district into or through which the said line extends. The value per mile of electric current transmission lines is to be determined by dividing the total value of such line within each county by the number of miles of such line within said county, and all operating property of such electric current transmission lines shall be assessed as of and apportioned to the county in which the same is situated as a part of the transmission line in said county.

All property assessed as herein provided shall be valued as of the same time as other property in the state is valued, and the value of all franchises held by any person whose property has been assessed as herein provided shall be included in the value of such property."

THE ISSUES.

The case presented to the trial court for determination four main issues:

(1) Upon what basis or by what rule was the property within the sphere of duty of the county assessors assessed and finally equalized?

(2) What was the full cash value of the property of the plaintiff for assessment on the second Monday of January, 1918?

(3) Upon what basis did the State Board of Equalization assess the property of the plaintiff?

(4) If the plaintiff was entitled to relief, what was the relief to which it was entitled?

THE DECISION OF THE TRIAL COURT, ITS FINDINGS AND THE RELIEF WHICH IT GRANTED.

First Issue. Upon the issue as to the basis or rule by which property within the sphere of duty of the county assessors was assesseds

Upon this issue, the finding of the court was directly to the effect that the allegations of the complaint were sustained by the evidence (R. p. 81 to 89). Its conclusion is thus stated:

> "The evidence leaves no room for doubt that the plaintiff is right in its contention that most of the other property in the State was assessed at not to exceed fifty per cent of its actual value." (R. p. 81).

These findings may be summarized as follows:

First: That most of the other property in the state was assessed at not to exceed 50 per cent of its actual value;

Second: That with the knowledge and acquiescence of some, if not all, of the members of the State Board of Equalization, an understanding was reached by the assessors of the

state at a meeting held at Boise that the assessment for 1918 should be on a 50 per cent basis and that generally that standard in fact was recognized in making the assessments (R. p. 88)

Third: The assessor for the County of Kootenai adopted a 50 per cent basis for the assessment of property within the sphere of his duty within said county (R. pp. 86 to 89).

Second Issue. What was the full cash value of the property of the plaintiff for assessment on the second Monday of January, 1918:

The court found the full cash value of the appellant's property on the second Monday of January, 1918, to be the sum of $3,620,000. To this finding appropriate assignments of error are directed and the question is covered hereafter in the argument. It may be proper at this place, however, to state the manner by which the court reached the conclusion.

Appellant presented detailed and complete evidence showing the original cost of its property, showing the cost of reproduction new and also showing the depreciation.

In addition thereto, appellant introduced evidence showing the rate of return upon this property, covering a period of years based upon a valuation of $2,470,000. Those returns were:

For
1916, 5.2 per cent.
1917, 6.3 per cent.
1918, 4.3 per cent (*Simpson, R. p.* 198)

The appellant further showed as a general rule an operating property ran about 73 per cent of the value new (R. p. 195)

Appellant also introduced the inventory of all of the property of the Washington Water Power Company in the State of Idaho and proved by the testimony of the best engineers available the value of its water rights.

The court declined to give consideration to any of these questions and based its conclusion upon what it construed to be the findings of the Public Utilities Commission of the State of Idaho with respect to the value of the property of the appellant situated in said state.

It is maintained by the appellant that this finding did not represent the full cash value for taxation purposes, but a value far in excess of that; that no allowance was made for depreciation and that the court fixed that sum arbitrarily and in defiance of the evidence, which was accurate, clear, conclusive and convincing.

It may here be stated that the evidence of appellant as to the value was not controverted or contradicted in any respect by the defendant county.

Third Issue. Upon what basis did the State Board of Equalization assess the property of the plaintiff.

The court below found that the State Board of Equalization assesstd the property of this appellant at 75 per cent of its full cash value and intended so to assess it at 75 per cent of its full cash value. To this finding appropriate assignments of error are directed. Appellant maintained that its property was assessed at a sum in excess of 100 per cent of its value.

Fourth Issue. The relief.

The relief granted by the court may be best stated in the court's own language:

> "The final inquiry relates to the concrete relief that may properly be afforded. The considerations are so complex that we can hope to do not exact but only substantial justice. The total assessed value in the defendant county for the year 1918 was $18,396,436.00. Of this total $11,595,837.00 was assessed by the local assessor, and the balance of $6,800,599.00 consists of valuations placed by the State Board of Equalization upon public utilities, including the property of the plaintiff. The evidence is not sufficient to warrant a finding that the State Board valued any of the utilities at fifty per cent, and the presumption will be indulged that its assessments were as to each other upon a basis of equality, and therefore that it put railroads, telegraph and telephone lines upon the same footing with plaintiff's property. It further appears that bank stock was assessed in excess of fifty per cent of its actual cash value, and while in view of the low valuations placed upon bank real estate we cannot with confidence find upon just what basis bank property as a whole was actually assessed, substantial justice will be done by withdrawing it from the class of property locally assessed and including it with public utilities. The total assessment on bank stock was $129,500.00. Making the necessary computation, we find that, including plaintiff's property, $6,930,099.00 was on a seventy-five per cent basis, and $11,466,337.00 upon a fifty per cent basis. As against the other property in the first class plainly the plaintiff's property is entitled to no relief, but as against the second class equality of treatment requires a thirtythree and one-third per cent reduction. The ratio of the two classes is approximately seven to twelve, or in other words, plaintiff is entitled to a reduction of thirty-three and one-third per cent upon twelve-nineteenths of its assessment, or a total reduction of $8,835.00. It has tendered and paid $23,080.84. Hence there is still due the defendant county $10,049.32, with penalties and interest thereon. Upon the payment of this amount the

residue will be cancelled and the injunctive relief prayed for granted."

To the findings of the court and its conclusion with respect to the relief granted, appropriate assignments of error are directed.

The appellant asserts with respect to the relief:

(a) The finding of the court to the effect that other utilities were assessed by the State Board of Equalization at 75 per cent is purely arbitrary; that there is not a scintilla of evidence in the record to sustain it;

(b) The court having found that the general property of the state systematically and intentionally was assessed at 50 per cent of its value and that the property of this appellant in Kootenai County and elsewhere was by the board assessed at 75 per cent of its value, the only relief applicable was to adjust the assessment of this appellant's property on the basis at which the general property was assessed. The court really granted under its own findings partial relief.

SPECIFICATION OF ERRORS.

Appellant makes the following assignment or specification of errors upon which it will rely upon its appeal from the decree entered herein:

I.

The court erred in finding, holding and deciding that the full cash value of the property of the Washington Water Power Company situated in the State of Idaho and subject to taxation in the State of Idaho on the second Monday in January, 1918, exclusive of the lighting system in the City of St.

Maries, Idaho, was the sum of $3,587,500.

II.

The court erred in finding, holding and deciding that the full cash value of the property of the appellant situated in the State of Idaho and subject to taxation in that state on the second Monday in January, 1918, inclusive of the lighting system of the city of St. Maries, Idaho, was greater than the sum of $2,438,978.

III.

The court erred in finding, holding and deciding that the State Board of Equalization of the State of Idaho, in assessing the property of the plaintiff for the year 1918, found that the value of the property of the plaintiff located in the State of Idaho and subject to taxation in said state was the sum of $3,587,500, exclusive of the lighting system in the City of St. Maries, Idaho.

IV.

The court erred in finding, holding and deciding that the State Board of Equalization of the State of Idaho, in assessing the operating property of the plaintiff in the State of Idaho, for the year 1918, found that the total actual value of the operating property of the plaintiff in the State of Idaho was the sum of $3,620,500.

V.

The court erred in finding, holding and deciding that the State Board of Equalization intended its assessment upon the operating property of this plaintiff for the year 1918, to be up-

on a basis of 75 per cent of the actual cash value thereof on the second Monday of January, 1918.

VI.

The court erred in finding, holding and deciding that the actual or full cash value of the operating property of the Washington Water Power Company located in the State of Idaho, exclusive of the lighting system in the City of St. Maries, Idaho, was found to be or fixed by the Public Utilities Commission of the State of Idaho at the value of $3,587,500 on the 31st day of December, 1917.

VII.

The court erred in finding, holding and deciding that the State Board of Equalization of the State of Idaho, in the year 1918, assessed the operating property of all the railroads, telegraph, telephone and electric current transmission lines within the sphere of the duty of said State Board of Equalization at 75 per cent of its full cash value, or upon an equality with or upon the same footing as the property of the plaintiff.

VIII.

The court erred in finding, holding and deciding that bank stock was assessed in excess of 50 per cent of its actual cash value in the County of Kootenai or in the State of Idaho.

IX.

The court erred in fiinding, holding and deciding that property in the County of Kootenai, State of Idaho, amounting to to the sum of $6,930,090, consisting of property assessed by the State Board of Equalization and of bank stock, was assess-

ed on a basis of 75 per cent of its full cash value.

X.

The court erred in finding, holding and deciding that the State Board of Equalization of the State of Idaho, for the year 1918, assessed any property other than that of plaintiff in the County of Kootenai within the sphere of its duty at a rate greater than 50 per cent of its full cash value.

XI.

The court erred in finding, holding and deciding that as to the property in the County of Kootenai, State of Idaho, assessed by the State Board of Equalization for the year 1918, and within the sphere of its duty and as to bank stock the plaintiff was entitled to no relief.

XII.

The court erred in finding, holding and deciding that there has been any appreciation in the value of the operating property of the plaintiff in the State of Idaho and subject to taxation in said State, or that any appreciation in value thereof or any value as a going concern equals or substantially equals the depreciation thereof.

XIII.

The court erred in finding, holding and deciding that the value of the operating property of the Washington Water Power company in the State of Idaho and subject to taxation in said State for the year 1918 was a sum in excess of the depreciated value thereof as found by the Public Utilities Commission of the State, to-wit, the sum of $2,487,999.

XIV.

The court erred in finding, holding and deciding that the property of the Washington Water Power Company in the County of Kootenai, State of Idaho, should be required for the year 1918 to pay taxes upon any sum in excess of 50 per cent of its full cash value on the second Monday in January, 1918.

XV.

The court erred in finding, holding and deciding that the plaintiff should be required to pay taxes for the year 1918 in Kootenai County, on its property in said county, on any basis greater than 50 per cent of the portion of $2,487,999, distributed to Kootenai County.

XVI.

The court erred in assuming or deciding that the railroad companies, telephone companies and other public utilities, except plaintiff, had in fact paid taxes in the State of Idaho on the basis of 75 per cent of the value of their respective properties.

XVII.

The court erred in assuming or deciding that the railroad companies, telephone companies and other public utilities had instituted no action either at law or in equity for the purpose of being relieved against their unequal and unjust assessment in said County of Kootenai and for the purpose of being put on an equality as to property generally in said County of Kootenai, so that they would be required to pay taxes on the basis of 50 per cent of the value of their respective properties the

same as other property exclusive of the property of this plaintiff in said county was required to pay by the taxing officers.

XVIII.

The court erred in assuming or deciding that the railroad companies, telephone companies, and other public utilities had no cause of action for the recovery of moneys unlawfully exacted of them on account of taxes for the year 1918, because of the unequal and unjust assessment of their respective properties.

XIX.

The court erred in deciding that if the railroad companies, telephone companies and other public utilities were assessed in the year 1918 upon their respective properties for taxation purposes at a higher rate than property was generally assessed, that therefore this plaintiff could be compelled to pay taxes at a higher rate than owners of other property were required to pay.

XX.

The court erred in undertaking to decide and adjudicate the rights of the railroad companies, telephone companies and other public utilities which are not parties to this litigation and to determine the plaintiff's rights on the basis of such attempted adjudication of rights of such other companies.

XXI.

The court erred in denying to the plaintiff any relief as to 7-19ths of the property of the plaintiff situated in the County of Kootenai, State of Idaho.

XXII.

The court erred in finding, holding and deciding that there is still due to the defendant on account of unpaid taxes the sum of $10,049.32 or any sum.

XXIII.

The court erred in finding, holding and deciding that the appellant is subject to pay any penalty or interest upon any sum to the County of Kootenai, State of Idaho, or that any penalties or interest should be imposed.

ARGUMENT.

In the preparation of this case, we were guided by the decision of the Supreme Court in the Kentucky tax cases entitled

Green et al v. Louisville & Interurban Ry Co., and

Green et al v. Louisville Ry Co., 244 U. S. 501; 61 Law Ed. 1280.

and

Louisville & N. Ry. Co. v. Green, and

Green v. Louisville & N. Ry. Co., 244 U. S. 522; 61 Law Ed. 1291.

and

Ill. Central Ry. Co., v. Green, and

Green v. Ill. Central Ry. Co., 244 U. S. 555; 61 Law. Ed. 1309.

and in submitting this brief we rely mainly upon the law as announced by the Supreme Court in those cases and shall cite only a very few additional authorities. These cases originat-

ed in Kentucky, where the state constitution and statutes providing for uniformity of taxation are very similar to the provisions of the Idaho Constitution and statutes on that subject.

Briefly stated, the Supreme Court held that where the state constitution and statutes enjoin upon taxing officers the duty of uniformity of assessment, but where, notwithstanding, a class of taxing officers charged with the duty of assessing property generally, intentionally and systematically assess the property within the sphere of their duty at a percentage less than its full cash value, and another board or class of officers charged with the duty of assessing a certain class of property assessed complainant's property of that class at a different and a higher rate or percentage of its true value, that "the equal protection" and "due process of law" clauses of the Fourteenth Amendment may be invoked by the complainant, and that the Federal Courts can and will grant relief by injunction against the excess over which the general property of the state is assessed.

THE BASIS UPON WHICH PROPERTY GENERALLY IN IDAHO IS ASSESSED.

As has been pointed out hereinbefore, the court found that property generally in the state,—that is, the property within the sphere of the local assessors, was assessed at not to exceed 50 per cent of its cash value for the year 1918. The total equalized assessed valuation of all property in the State of Idaho for the year 1918 was $430,863,703, of which, property to the amount of $324,649,027. was assessed by the county assessors. In other words, over 75 per cent of the property of

the state was assessed by the local assessors. In Kootenai County, out of a total assessment of $18,396,436, $11,595,837, was assessed by the local assessor. The assessor for Kootenai County testified that property within the sphere of his duty was assessed at not to exceed 50 per cent of its value, and the court found that such was the case in Idaho generally, and in Kootenai County specifically. The discussion of this phase of the case is found in the opinion of the court, pages 81 to 89 of the record. The valuation at not to exceed 50 per cent was intentional, systematic and general throughout the State. It was the result of an agreement, made at a meeting of the assessors at Boise, between the assessors of the State and certain, if not all, of the members of the State Board of Equalization. The members of the State Board of Equalization, all of them, whether parties to the original agreement or not, had full knowledge of it, and it was openly discussed and referred to during the meeting of the Board in 1918. It may be here stated that among other duties of the State Board of Equalization was that of equalizing upon a basis of uniformity all of the property of the state.

The evidence sustaining this finding is clear and could not be contradicted. In the first place, the assessor for Kootenai County, testified that he assessed the property within the sphere of his duty at 50 per cent because of the agreement of the assessors and in order that property in Kootenai County should not bear more than its share of the burden of maintaining the state government.

State funds are loaned on farm mortgages by the State Land Board, the law limiting the amount loaned to one-third of the market value of the lands, exclusive of the building thereon. The personnel of the land board is practically identical with that of the State Board of Equalization.

Upon a search of the records of the land board and the records of fifteen counties in different sections of the state, it was found that 151 loans of this character had been made by the state aggregating $336,900. The assessed value of all of these lands with improvements, including buildings, was only $324,892, and the state's appraisement of the value of the mortgaged lands was $860,193.

As the court remarks, "it will be observed that while the loans are suppose to be for not in excess of one-third of the market value, that they are slightly in excess of the total assessment, and that assessment is scarcely 40 per cent of the appraised value."

Similar evidence was introduced with respect to loans made by the Federal Farm Loan Bank. A total of 383 such loans in Benewah, Bonner and Kootenai counties within all of which is property of the appellant, aggregated $622,605 upon lands, the aggregate assessed valuation of which was $476,136. The Federal Farm Loan Act limits the loans to be made to 50 per cent of the value of the property.

In six counties in different sections of the state 1591 mortgages were found of record aggregating $5,540,445 upon lands assessed for an aggregate sum of $3,232,690. Of these, 380

were in Kootenai County, aggregating a total of $540,761 on lands assessed at $488,680.

As the court below said: "It is, of course, well known that generally mortgages are not placed for more than half the value of the mortgaged property."

Other testimony clear and convincing was introduced to the same effect. Moreover, the testimony of other assessors was to the same effect.

The court held that the record tends to show that in many instances and in some counties generally agricultural lands were assessed at a figure substantially below 50 per cent. Similar tabulations were presented to the State Board of Equalization.

Simpson, Record, p. 193.

The foregoing resume of some of the evidence is introduced for the sole purpose of advising the court of the clear proof of the facts which were and must have been within the knowledge of the State Board of Equalization.

THE COURT ERRED IN BASING ITS RELIEF UPON THE ASSUMPTION THAT OTHER UTILITIES IN KOOTENAI COUNTY ASSESSED BY THE STATE BOARD OF EQUALIZATION, AND BANK STOCK, WAS ASSESSEDAT ABOUT 75 PER CENT OF ITS CASH VALUE.

In the Kentucky tax cases and the cases reviewed by the Supreme Court in its opinion in those cases, there was no secret as to the percentage of the true value or rule by which the state

Board assessed properties of the class coming within the sphere of its duty. The contest there was as to the percentage adopted by the assessors charged with assessing the property of the state generally. In each of those cases one railroad which had been assessed at the percentage and by the rule adopted by the said Board, maintained that its property was assessed at a higher percentage than that adopted by the assessors of the state in assessing the property within the sphere of their duty. The Supreme Court held that such was true, and that the railroad company was entitled to a decree reducing its valuation so as to place it upon an equality with the property assessed by the other assessing officers, and such relief was granted. And the lower court insofar as that relief was granted, it was affirmed by the Supreme Court.

The appellant insists that, having convinced the court, and the court having found that the general property of the state comprising 75 per cent of all property was assessed at 50 per cent of its cash value and that the property of appellant was assessed at 75 per cent of its cash value, that the least relief the court could give would be to place the property of this appellant on an equality with the property of other taxpayers who were assessed at 50 per cent, but the court did not do so. The rate at which the State Board of Equalization assessed other utilities within the sphere of its duty, was not an issue in this case, and was not in any sense necessary to a determination of the issues or the granting of relief. Whether the Board assessed other utilities, fraudulently, upon a higher percentage or a low-

er percentage or upon the same percentage as appellant's property was assessed cannot affect the invidious character of the assessment which that Board unjustly, knowingly and intentionally placed upon appellant's property. In all of the cases which we have been able to examine, where a state board, as did this state board, assessed the property within the sphere of its duty in excess of the percentage upon which the general property of the state had been uniformly assessed by the county assessors, the court has enjoined the collection of the tax upon such excess.

Later in the brief we will discuss this feature and direct the attention of the court to the decisions which so hold.

Whether the State Board of Equalization in 1918 assessed the property within the sphere of its duty at 75 per cent or at some other percentage is immaterial in determining the relief to which this appellant is entitled. We desire to point out how erroneous , and arbitrary, is this finding of the lower court. The finding may be best stated in the court's own language:

> "The evidence is not sufficient to warrant a finding that the State Board valued any of the utilities at fifty per cent, and the presumption will be indulged that its assessments were as to each other upon a basis of equality, and therefore that it put railroads, telegraph and telephone lines upon the same footing with plaintiff's property."

In the first place, the court says the evidence is not sufficient to warrant the finding that the State Board valued any of the utilities at 50 per cent. The fact is that the appellan introduced no evidence with respect to the value of said other

utilities. To place such a burden on the taxpayer would of course be prohibitive. To valuate the railroads of the State of Idaho or any one of them so as to compare its real value with its assessed value would be a task of such magnitude and expense as to be absolutely prohibitive. To undertake to valuate the utilities of the state,—telephone, telegraph and other electric transmission lines, would likewise be prohibitive. Experience of the public utilities commissions and of the Interstate Commerce Commission indicate that it costs not less than $2000 per million of valuation to valuate utilities. If the rights of appellant, or of any other taxpayer, depend upon the production of such testimony as that, it will be left remedyless in a court which adopts such rule as the court below.

THE APPELLANT COULD NOT HAVE CALLED THE MEMBERS OF THE BOARD OF EQUALIZATION.

It was impossible and would have been illegal for the appellant to have called the members of the State Board of Equalization and to have inquired of them concerning the assessment of the property either of this appellant or of other utilities. In

Chicago, Burlington & Quincy Ry. Co., v. Babcock, 204 U. S. 585

it was held:

> "The members of a state board of equalization and assessment should not be subjected to a cross-examination, on a proceeding for equitable relief against the taxation of railroad property, with regard to the operation of their minds in arriving at the valuation of such property for tax purposes."

On the other hand, there would have been no impropriety on the part of the defendant county showing by the members

of the State Board of Equalization the rule and basis of assessments which was adopted by them and that that basis was 75 per cent of the value of the utilities, if such were the fact.

WHAT ARE THE FACTS SUPPORTING THE FINDING?

Not a scintilla of evidence in the record to support the finding that the State Board of Equalization valued any other of the utilities which it was within the sphere of its duty to assess at 75 per cent of its value.

WHAT ARE THE FACTS CONTRADICTING THE COURT'S FINDING AND DISREGARDED BY THE COURT?

The record shows without contradiction that there was no attempt made by the State Board of Equalization at its 1918 meeting to hide or cover up the purpose of the board to assess and equalize property generally at 50 per cent of its value, both property originally assessed by the county assessors and the property to be assessed by the State board itself.

C. E. Arney was present at all of the public sessions of the board at its 1918 meeting and made notes of its proceedings. His testimony is found at pages 137 to 148 of the record. These notes included statements made in the open sessions of the board by the Governor and other members of the Board of Equalization. Mr. Arney testified as follows:

> "When Mr. Kersted was speaking for the Idaho Power Company, the Governor commented: 'Look how near we assessed this property last year without any of these figures. That's what we assess railways—fifty per cent.' (R. p. 139-140)

On August 22nd, when Mr. Capps was speaking for the Ashton & St. Anthony Power Company, Governor Alexander said: 'We are assessing other property, Mr. Capps, at fifty per cent, and we are assessing you at about twenty cents on the dollar. In fact all property ought to be assessed higher than that.' (R. p. 140)."

On pages 143 and 144 Mr. Arney further testified:

"On the 24th, when the subject of the assessment of the Milwaukee Power Company was under discussion, the Auditor, Mr. Van Dusen, said: 'If we should assess them at $60,000 the court might say we had exceeded the percentage at which we assess other property.' To which Attorney General Walters replied: 'As long as we use our judgment, we are a court unto ourselves. Unless the court was convinced that there was fraud that would have nothing to do, although we might assess some at a hundred per cent and some at five per cent.'

When these statements were made, it was in the regular meeting of the Board with the board members present.

Q. Was exception taken to any of those statements by any member of the board?

A. No, only as I have read colloquies, as the last, between Van Dusen and Walters." (R. p. 143-144).

On cross examination, Mr. Arney testified as follows:

Q. When the Governor made this statement about which you have testified, 'that is what we assess railways, fifty per cent,' he contended, did he not, that railroads were assessed too low?

A. Yes, I think it is susceptible to that inference. I don't think he did, in addition to what I took down, make that statement or contention, that railroad property

was assessed too low. I think if he had, Mr. Potts, I would have recorded it.' (R. p. 148).

Among other references which show the purpose of the board and its intent is the following taken from the testimony of Mr. Arney at page 142:

> "On the 19th the Governor said to Mr. Knox, chairman of the Board of County Commissioners of Gem County: 'Do you not think the assessment on dry-farm land at $13.00 is nearer thirty-three and a third of the actual value than fifty per cent? Twenty-nine thousand acres irrigated land—fine fruit land, at $41.38 per acre; that land is worth $150.00 per acre.'
>
> That was referring to the irrigated land in Gem county, around Emmett."

Yet the records of the State Board of Equalization page 19 (Exhibit 10) shows that the Gem assessment roll with respect to the irrigated lands and the dry farm lands was approved.

Again on pages 142 and 143 is the following:

> "On the 19th, speaking of Cassia County, the Treasurer, Mr. Eagleson said, that it was only assessed at about forty per cent of its value. The Governor then said: 'Land in Minidoka and Loncoln counties should be raised thirty per cent.' And the Governor moved to increase Gooding county land ten per cent, saying, 'That would be forty per cent.' "

An examination of the proceedings of the State Board of

Equalization (Exhibit 10), shows that the Cassia County assessment roll was not changed. The governor's motion referred to on page 143 that Gooding County lands be raised 10 per cent was adopted.

To throw some light generally on the manner in which this board acted, attention is called to the following statement of the State Auditor Van Dusen, a member of the board and the discussion found in the record, at pages 141-2.

> "When the Blaine County assessment was being discussed, attention was called to exemptions. Auditor Van Dusen said, on the 17th: 'It was agreed by all assessors and this Board last January that household goods and jewelry should be exempt.' The Ada County assessor, Mr. Kincaid, said, 'When we find a man with $400 or $500 household goods we do not assess him; when it is $1200 to $1500 we do.'
>
> The Auditor said: 'That was our gentleman's agreement of last January.'
>
> The Ada County Assessor said: 'They are all to be exempt. We had better wire the Blaine County Assessor and see that he does as we agreed.' This was after discussion over the Blaine County Assessor not having kept the agreement." (R. p. 141-2).

There is not a scintilla of evidence in the record on behalf of the appellees showing or tending to show that railroad property was assessed or intended to be assessed at in excess of fifty per cent of its valuation. Governor Alexander, stated in open meeting that it was the purpose or the board to essess railways and power companies on a fifty per cent basis, and not a member dissented. To hold, therefore, as the court below did, that because it had found that the Washington Water Power

Company was assessed on a seventy-five per cent basis, that all other utilities were assessed on the same basis is attaching a presumption of equality and equity in the case of a board which is denied by every evidence of the intent of the board of its purpose, and in fact by the remaining findings of the court itself.

The court repeatedly finds that the board knowingly permitted the assessment of the property within the sphere of duty of the local assessors to be assessed on a basis of 50 per cent. It was expresly found that the board was or the members thereof were a party to the assessor's agreement to assess on that basis, to-wit:

> "By the record as a whole I am impelled to the conclusion that with the knowledge and acquiesence of some, if not all, of the members of the State Board of Equalization, the understanding was reached by the assesors at the Boise meeting that the assessments should be on a fifty per cent basis, and that generally that standard in fact was recognized in making the assessments."

In other words, the court finds that the State Board of Equalization deliberately, not only permitted, but recognized and acquiesced in, a violation of the law with reference to the basis of the assessment of the property within the sphere of duty of the local assessors; that it deliberately violated its duty in not equalizing such assessments.

The court also finds that the State Board of Equalization violated its duty with respect to the assessment of property within its sphere of duty and deliberately and fraudulently, for such must be the only conclusion, assessed property within

the sphere of its duty 50 per cent higher than it equalized the general property of the state.

Notwithstanding it finds the State Board of Equalization senseless of legal and moral obligations, the court holds that the presumption will be indulged that as to public utilities it acted with equity and equality.

What reason exists for indulging the presumption that the State Board of Equalization assessed the property of other utilities on the same basis as the property of appellant, rather than that it assessed the property of other utilities upon the basis of 50 per cent. It is just as easy to indulge the one presumption as it is the other. Inasmuch as the great body of the property of the state was equalized by the Board on a basis of 50 per cent and inasmuch as it was repeatedly stated by the governor, without contradiction, at the meetings of the Board that it was the intention to so assess railroads and power companies it would seem a little easier to indulge the presumption that the 50 per cent basis was adopted as to other utilities. Is the evidence of one excessive assessment to afford in law the presumption of excessive assessment as to all valuations made by a board?

The only evidence in the record was that showing the intent of the board as expressed by its members in open meeting, to assess railroads and utilities at 50 per cent. This the court entirely disregarded. The fact is that the court's conclusion that the property of the Washington Water Power Company was intended to be assessed on a basis of 75 per cent is based

upon inference and the inference that other utilities were, therefore, assessed on the basis of 75 per cent involves the basing of an inference upon an inference, which is violative of the rules of evidence. No inference which is itself based upon another inference is proof of a fact.

Manning v. Insurance Co., 100 *U. S.* 693

United States v. Ross, 92 *U. S.* 281

In the last case, the Supreme Court said:

> "It is obvious that this presumption could have been made only by piling inference upon inference and presumption upon presumption*****These seem to us to be nothing more than conjectures. They are not legitimate inference, even to establish a fact; much less are they presumptions of law. They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact, is generally, if not universally, inadmissable. No inference of fact or of law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Starkie on Ev. p. 80, lays down the rule thus:
>
> " 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue.'
>
> "The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best. Ev., 95. There is no open and visible connection between the facts out of which the first presumption arises and the fact sought to be established by the dependent presumption." (citing Douglas v. Mitchell, 35 Pa.St. 440)

Before passing this question, may we not be permitted to suggest that the conclusion of the court not only is not supported by facts but can not be supported by presumption under any principle of evidence.

In effect, the court finds that the State Board deliberately and knowingly perpetrated a wrong in assessing the property of appellant upon a 75 per cent basis. Is it to be permitted to indulge the presumption, therefore, that it committed a similar wrong in assessing the property of the Great Northern Railway Company? If there be no evidence and the matter is to be determined by presumption, is it not to be presumed that as to the property of the Great Northern Railway Company it was assessed upon the same 50 per cent basis upon which the general property of the state was equalized.

Fraud is never presumed. Wrong conduct on the part of a board charged to do a certain thing is never presumed; it must be satisfactorily proved. The court presumed, without evidence, that the state board violated the law, in assessing the property of the railroads in the State of Idaho upon a different basis than other property was assessed. The fact that a board is found guilty of fraud in one instance is not proof in the absence of some evidence that it is guilty of fraud in some other instance, nor can there be any such presumption.

With respect to the assessments made by the county assessors, the lower court itself refers to the fact that even in the counties, notwithstanding the agreement of the assessors to assess on a 50 per cent basis, there are wide departures in

isolated cases. It is not as reasonable to suppose that there were departures in the assessment made by the state board?

BANK STOCK

Reference is made in the opinion of the court to the assessment laid against the bank stock, and a brief statement respecting the same perhaps is required.

In 1918, and prior to an act of the legislature adopted in 1919, bank stock was assessed under a particular statute fixing its value in the amount of capital, surplus and undivided profits after deducting therefrom real estate and improvements thereon, furniture and fixtures, which were assessed by the assessor as other property. (Sec. 172, p. 137, Session Laws, 1917)

Section 173 of said act found at the same page, provided for a statement showing the said value. It is not deemed essential to set forth said statutes.

The legislature of Idaho, by an act approved March 3, 1919, found at page 77 of the Session Laws of 1919, recognized that bank property was not being assessed upon the same basis as other property and by that act provides in substance that the shares of the capital stock of any bank should be assessed for taxation upon the same basis as other property. In lieu of the original language of Section 172, to-wit: "At the full cash value thereof at 12 o'clock meridian on the second Monday of January in each year," was inserted the provision:

> "As in the same manner and upon the same basis of actual value, and uniformly with all other property assessed actual value in which such shares of capital stock are as-

sessed, said value to be determined as of the second Monday of January in each year at 2 o'clock meridian."

The tabulation of bank assessments included within Exhibit 4 shows that the banks, as a matter of fact, were not assessed even in 1918 under the law then in force at anything like their full cash value. Their real estate and improvements, furniture and fixtures are assessed only at a percentage thereof. No consideration was given to the fact that it was a going concern or to the actual value of the shares.

With reference to the largest bank in Coeur d'Alene, it was shown that the capital stock, surplus and undivided profits amounted to $111,484 and that the assessed value laid against the bank really was $72,636 (First-Exchange National Bank of Coeur d'Alene) (R. P. 114-115). The $72,636 was made up as follows: Real estate, $14,988; furniture and fixtures, $4000. These were worth as carried upon the bank's statement and as deducted from the capital, surplus and undivided profits, $56,236, which left a balance of assessment upon the stock of $55,648. In other words, that bank was assesed upon a basis of not to exceed 65 per cent. The First Bank of Harrison was assessed upon a basis of 67 per cent; the Valley State Bank of Post Falls upon a basis of 59 per cent; the American Trust Company of Coeur d'Alene upon a basis of 58 per cent and the Coeur d'Alene Bank & Trust Company was assessed at less than 60 per cent. These figures are a comparison of the total value of the capital, surplus and undivided profits with the total assessment (P. 114-117). None of them take into consideration the actual value of the stock based

upon its worth or upon the fact that it is a going concern. In any event, it is a relatively small item in the county.

THE RELIEF TO WHICH APPELLANT WAS ENTITLED

Where the constitution of a state requires equality of assessment and the property of the state or a county is assessed part by one set of officials and part by another, and one set of officials assesses the property within its sphere of duty upon one basis of its value, and the other upon another, the property owner whose property is assessed at the higher basis is entitled to have the excess at which his property is assessed declared void.

A resume of the findings of the court and its conclusion presents the question directly.

THE FINDINGS.

1. That the assessor of Kootenai County, in accord with the other assessors of the state, adopted a fifty per cent basis for assessment in Kootenai County.

2. With knowledge of that standard of assessment, the State Board of Equalization intentionally assessed plaintiff's property on the basis of seventy-five per cent.

3. That 12-19 of the property of the County of Kootenai was assessed by the county assessor on a fifty per cent basis.

4. That the bank stock of the county was assessed on approximately a seventy-five per cent basis (this because bank stock was assessed under a statute fixing the assessment at the capital stock and surplus, less real estate, which was assessed as was other property). The court neglects to take into consider-

ation the fact that the bank stock may have been of much greater value than the capital stock, plus the surplus.

.5 That by reason of its findings based upon the inference that the State Board of Equalization assessed utilities in Kootenai County other than the appellant, at seventy-five per cent, 7-19 of the property of the county was either the property of utilities or bank stock, and therefore assessed on the basis of seventy-five per cent, about the same as the assessment of appellant's property.

6. That the assessment of appellant's property was discriminatory and illegal.

THE CONCLUSION.

The conclusion was that as to 12-19 of its property, appellant was entitled to relief by having the same reduced to a 50 per cent basis, and as to the remaining 7-19 it was entitled to no relief.

APPELLANT'S CONTENTION.

Appellant maintains that the minimum of relief to which it was entitled under the findings was a decree declaring the excess over 50 per cent void. In other words, that it was the duty of the court to place the property of this appellant upon the same basis as the property of the taxpayer who was assessed by the local assessor, namely, on a basis of 50 per cent.

THE COURT EITHER OVERLOOKED OR DISREGARDED AN EXPRESS STATUTORY PROVISION.

Section 3175, Idaho Compiled Statutes, 1919, is as follows:

> "The valuation of all property which, according to the provisions of this chapter, shall be exclusively assessed for taxation by the state board of equalization, shall be equalized in relation to the valuation of other property in the state, according to its full cash value."

The principle adopted by the court below was directly contrary to the above statute. That provision made it the duty of the state board of equalization in assessing the property of the Washington Water Power Company to equalize that assessment in relation to the other property of the state not assessed originally by the board of equalization, to-wit: on a 50 per cent basis.

Such was the right of appellant before the board of equalization; such was the duty of the board of equalization; such was the express statutory command. Was it not the duty of the court, therefore, to accord to the appellant the right which the statute enjoined? In other words, under the statute itself, is not the excess void? Under the findings of the court in framing the relief there was nothing to do under that statute but to equalize the property of appellant upon a basis of 50 per cent.

IN STATES REQUIRING UNIFORMITY OF ASSESSMENT, THE RULE OF COURTS IS HARMONIOUS IN HOLDING THE HIGHER ASSESSMENT TO BE VOID IN THE AMOUNT OF THE EXCESS.

The result reached by the court below expresses an original idea of the learned judge, which is without precedent. The relief granted in all other cases is the relief prayed for by us in our complaint.

We are confident, in a case like this, where the general assessment made by the county assessors is made pursuant to a plan adopted to assess on a basis of a given percentage, that as to property assessed by a different body on a higher basis, the only relief applicable is to adjust on a basis of the lower assessment. For the court is without jurisdiction to raise the lower assessment, and therefore can bring the property on the same basis only by reducing the higher assessment to the level of the property assessed on the lower basis.

In

Louisville & N. R. Co. v. Bosworth, 209 Fed. 380

the court found, on motion for a preliminary injunction that where the property of a railroad company was assessed at its fair cash value, and where other property had been assessed upon a substantially lower basis, that the excess over the lower basis was void. In the opinion, on page 456, the rule is stated as follows:

> "There can be no question, therefore, that if there has been such discrimination as claimed by plaintiff, i e., if its property has been assessed at not less than its fair cash value and the other property in this state, except possibly that of other railroad companies of similar character, has been uniformly and purposely assessed at substantially less than its fair cash value, the assessment is void at least to the extent which it exceeds the percentage of such other property."

The case later came before the District Court for final decree.

And in the same case

Louisville & N. R. Co. v. Bosworth, 230 Fed. 191.

the court found on said final hearing that the general property of the state was assessed on a basis of 60 per cent and it did enjoin the defendants from enforcing any part of the assessments upon the property of the railroad company in excess of 60 per cent of the value of that property as found by the court. The conclusion of the opinion directing the decree is as follows:

> "A decree will be entered enjoining defendants from enforcing the assessment complained of, and from making and enforcing any other assessment of plaintiff's franchise for the year 1913, on condition that it pays the taxes, state and local, on $2,909,193.60 in addition to what it has paid. But, if either side desires it, the decree may be limited to an injunction against the enforcement of the assessment complained of without prejudice to the making and enforcing of another assessment for that year, to be equalized at 60 per cent., and to be credited with the sum on which payment has been made."

Cross appeals were taken and the cases reported as

Louisville & N. R. Co. v. Green, and

Green v. Louisville & N. R. Co., 244 U. S. 522,

one of the Kentucky tax cases. Insofar as the conclusion of the court with respect to the relief was concerned upon the appeal of the officials of the state, the decree was affirmed. The railroad appealed from the decree of the court below upon the method adopted to arrive at the valuation placed upon the property of the railroad. In that respect the action of the lower court was reversed. So that, so far as measuring the relief was concerned, the rule announced in the district court received the approval of the Supreme Court of the United States. That rule is departed from by the learned court below in the

relief granted in this case.

There are other Federal cases from courts of high authority announcing the same rule which was adopted by the district court in the Kentucky cases.

Judge Taft, speaking for the Circuit Court of Appeals for the Sixth Circuit, adopted the same rule in

Taylor v. Louisville Ry. Co., 88 Fed. 368.

In that case the evidence showed that the complainant's railway company's property had been assessed itself at 100 per cent of its value; that other property of the state, except railroad property and property of telegraph and telephone companies was assessed at 75 per cent of its value. Incidentally, the court found that 1-8 of the property of the state was the property of railroads, telegraph and telephone companies. That by reason of the 100 per cent valuation placed upon it as against a 75 per cent valuation placed upon other property, such property was required to pay 1-6 of the burden of government. In granting relief, however, the court did not undertake to adjust the tax of complainant upon the basis adopted by the court in this case,—that is, only granting partial relief because other railroads and telegraph and telephone companies had likewise been mistreated. In granting the relief, the court reduced complainant's property for taxation purposes to a 75 per cent valuation. The language of Judge Taft is as follows:

> "The various boards whose united action is by law intended to effect a uniform assessment on all classes of property are to be regarded as one tribunal, and the whole assessment on all classes of property is to be regarded as

one judgment. If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the fully-assessed property. And this is true although the particular board assessing the complainant's property may have been wholly free from fault of fraud or intentional dis crimination. Therefore the injunction might issue against the assessment upon the fully-assessed property, as void altogether, until a new and uniform assessment upon all property according to law could be made. And such is the rule in some courts? *Weeks v. Milwaukee,* 10 Wis. 263; *Hersey v. Board,* 16 Wis, 192; *Smith v. Smith,* 19 Wis. 619. The inequity of allowing the taxpayer to escape altogether, and the intolerable inconvenience to the public in the delay incident to such a course, however, lead a court of equity to shape its order so as to allow only so much of the fraudulent judgment to be enforced against the complainant as may be done without imposing on him any inequality of tax burden. We reach the conclusion, therefore, that the circuit court was right in enjoining the unjust, unequal, and (in the sense already explained) fraudulent assessment against the complainant; but we think the order should have required, as a condition of the issuing of the injunction, that the complainant should pay to the proper officers a tax upon the 75 per cent of the assessment made by defendants."

In L

Mudge v. McDougal, 222 Fed. 562

the court found the railway property of the state and of the county of St. Francis, Arkansas, was assessed at fifty per cent of its value by the state board, while other property in St. Francis County was assessed and equalized by the local officers at 25 per cent of its value. The court held that collection of the

tax be enjoined upon the railroad company paying into St. Francis County taxes due upon 50 per cent of the amount assessed by the state board.

In

C. B. & Q. R. Co. v. Board, 39 Pac. 1039

the court found that railroad property in the State of Kansas was assessed at its full value. By agreement of local assessors, other property was assessed at 25 cents on the dollar. Plaintiff tendered 25 per cent of the local taxes and the whole state tax. Held, upon plaintiff paying to the county treasurer the 25 per cent of the amount demanded, the collection of the balance should be enjoined.

We might well leave this question without further discussion. There are some consideration, however, which clearly show the reason of the rule and the senseless conclusion reached by the lower court.

The court not only assumes that the railroads, telegraph and telephone companies and the other public utilities have had their property assessed at 75 per cent of their fair value, but he also must assume, although it is not so stated in his opinion, that each of the other public utilities has pending in no court, either Federal or State, any action for relief against such unlawful assessment, and that each of said public utilities has voluntarily paid on the basis of such unlawful assessment, or has no cause of action for relief on account of such unlawful assessment.

Suppose that each of the public utilities had brought a suit

in the Federal Court for relief similar to the instant case and they had been consolidated for purposes of trial before the learned judge, he would have then been bound, according to his own reasoning, to grant relief in favor of all of them and hold as void the assessment of each in excess of 50 per cent of the fair value.

What he is attempting to do in this decision is to act as a board of equalization and to equalize a portion of the property of the appellant with that of other public utilities and a portion of the property of the appellant with that of other property in the state, and that, too, upon the assumption that the assessment of the other public utilities must stand at 75 per cent of their respective values. The court, therefore, necessarily assumes that each one of the other public utilities is foreclosed from obtaining any relief in any court because of such unlawful assessment.

If the learned judge had the right, which we deny, to assume that each of the other public utilities had been assessed at 75 per cent, he certainly had no right to assume without evidence that each of the other public utilities has no right to obtain any relief in any court on account of its unlawful assessment.

There is absolutely nothing in the record to show that all of the other utilities are not also protesting their taxes and refusing to pay them. If any presumption is to be indulged, it would seem to be that they have not paid them but that they have causes of action to correct this injustice.

A statement of the real effect of the decision below is: There have been others in the County of Kootenai than appellant who have been "jobbed" and imposed upon by the taxing officers. That although the appellant has been "jobbed" and imposed upon, it is the duty of a court of equity to some extent (to the extent of 7-19 of its property) to place its property, because it happened to be a utility, in the same class with the others who have been so mistreated. The result is to discriminate against the appellant and in favor of the great majority of the taxpayers of Kootenai County both in number and in amount.

Under the decision of the court, before its decree was entered there were two bases of taxation for property in the County of Kootenai:

1. The property of utilities assessed by the State Board of Equalization and the property of banks assessed under a statute at 75 per cent

2. The great body of the property of the county, assessed by the county assessor upon a basis of 50 per cent.

There is now a third class, towit: The property of the Washington Water Power Company, assessed upon a basis of 60 per cent.

The result is that as to the great body of property of the County of Kootenai the valuation for assessment purposes laid by the court against the Washington Water Power Company is not uniform and is discriminatory. The owners of that other property paid upon one basis and the Washington Water Power Company is ordered to pay upon another basis. Had the court

below the jurisdiction or power to constitute itself into a board of equalization to raise the property which was assessed on a 50 per cent. basis or lower the property which he found had been assessed on a 75 per cent. basis, he might have extended to appellant "the equal protection of the laws". As finally framed, his decree denies this. But another consideration has bearing. Not only is the tax discriminatory and unjust as to the other property in Kootenai County, but it is unjust as compared to the 312 millions of dollars of property in the State of Idaho assessed by the county assessors other than the assessor of Kootenai County, for the reason that the state government is maintained by a tax levied against all of the property of the state. In the third place, in figuring the 7-19, the court includes all of the property of the Washington Water Power Company in Kootenai County as assessed by the State Board of Equalization, not only the 7-19 but all of its property and in that manner uses even that part concerning which he grants relief to bring up the percentage in amount of that on which he refuses to grant relief.

The Supreme Court, in Louisville v. Green, described the conclusion of the trial court there as being based upon "rough and ready reasoning". Such is not an inapt description of the decision of the trial court here. In the case last cited, the Supreme Court said:

> "The result of the method adopted in making up the decree was to deprive plaintiff of the relief it was entitled to upon the basis of the facts as found, because of a surmise that, upon other facts not shown by the record, a conclusion sustaining the Board's action might have been

reached.

Another convincing proof of the error of the decree may be stated in the following manner:

The manner or rule adopted by the court in measuring the relief is unsuond, because manifestly it grants only partial relief. For illustration: A small part of plaintiff's property is assessed by the assessor, it being non-operating property. Taxes on this property were paid without complaint. Let us suppose that plaintiff's property of that character, instead of being a very small portion, did actually comprise 12-19 of its total in the county, and was assessed by the assessor, in conformity with the plan of the assessors throughout the state, on a basis of 50 percent of its value, and that the remainder, 7-19 of plaintiff's property in the county, was assessed by the State Board at 75 per cent of its value with knowledge of the plan adopted by the assessors. The tax, if no protest were made or action instituted, would amount to just what the court has required plaintiff to pay in this action. In that case the assessor and the State Board would have done just what the court did here, but the vice which is the foundation of this action—that is the systematic and intentional over-valuation of one class of property as compared with another, would have existed exactly as it is found by the court to exist in this case. In an action for relief as to the 7-19 discriminated against, the court, under the law as announced in this case would be compelled to grant relief. In other words, under the facts as found and the law as announced the court would have granted relief against the

thing he has done, had it been done by the assessor and the State Board instead of by the court.

NO PENALTIES BY WAY OF INTEREST OR OTHERWISE SHOULD BE ADDED.

By the decree of the lower court the taxes assessed against appellant's property were held invalid in part. From the very nature of the case, the part or amount of valid taxes could be definitely determined only upon a hearing in court.

The power company, before it was in default for non-payment of taxes for 1918, tendered the tax collector of Kootenai County 55 per cent. of the assessment. The tender was made and rejected upon the following conditions:

> "At the time of the said tender plaintiff stated to the said W. A. Thomas, tax collector as aforesaid, that it did not request, require or desire of him a receipt in full; that it tendered said sum believing it to be all that was justly or otherwise due on account of taxes for the year 1918 upon its operating property in said county, but that it simply desired a receipt for that much money; that said defendent W. A. Thomas, tax collector as aforesaid, refuesd to accept the said tender or to receive the said money, said Thomas stating that he would only receive either the money to the full amount of the taxes extended on the tax or assessment rolls of said Kootenai County against the defendant or half thereof, giving receipt either for the said full amount or for the first installment of one-half, and upon the understanding that the plaintiff was paying the first installment upon its taxes for the year 1918. The said Thomas refused to give any other receipt for said money or to receive the same unless the plaintiff tendered and paid the full amount of its taxes or tendered and paid the first installment thereof, being one-half thereof, upon the distinct understanding that it was one-half and the first installment of taxes." Complaint, Par. 32, R.pp. 30 and 31. Answer, par. 25, R.p. 63.

Subsequently the tender was accepted by the appellees. The record amply bears out appellant's claim that it tendered what it believed and fairly was justified in believing was a fair, lawful and equitable tax due upon its property. Having so done, no penalty or interest as penalty should have been added. Notwithstanding the fact that the court held that a substantial part of the tax which had been levied against appellant was included, and nothwithstanding the fact that that could only have been ascertained after a hearing, the court below did enter judgment against the defendant for $2,381.88 penalty and interest. The penalty amounted to 6 per cent. upon the amount found due and the interest amounted to 12 per cent. per annum upon the combined tax and the penalty of 6 per cent.

So much of the Idaho Statutes with respect to the penalty need be but briefly referred to:

Sec. 113, Chapter 69, Session Laws, 1915, page 177, provided:

> "All taxes extended on the real property assessment roll shall be payable to the tax collector, without penalty on and after the fourth Monday of November in the year in which said taxes are levied, and prior to the first Monday of January next thereafter; and all such taxes which have not been paid prior to the said first Monday of January shall be delinquent, and a penalty of six per centum of all such taxes added thereto."

The form of the delinquency certificate is provided by Section 121, Chapter 151, of the Session Laws, 1917, page 473. It need not be set forth in full. Section 127, as amended by the Act of 1917, Chapter 151, Session Laws, 1917, page 474, is as follows:

> "All delinquent taxes and penalties, as shown in the delinquency certificates, bear interest from the date of such certificates until paid or until the issuance of tax deed, and such interest must be paid by any redemptioner of the property as a condition of redemption."

The substance, therefore, of this statute is that a penalty of 6 per cent. is added, then interest is charged on the delinquent tax and penalty at 12 per cent.

In such cas as this, to tax against the appellant any such penalty is, we respectfully assert, the clearest error. The legal rate in Idaho is 7 per cent. per annum, which goes to show that the 12 per cent. per annum which the statute above quoted imposes upon both the tax and the penalty, is itself a penalty.

This question has recently been fully considered by the Supreme Court of the State of Washington in a case which involved solely the question as to whether or not penalties or interest by way of penalties should be added, in a case similar to the one at bar. The conclusions of the court are well set forth in the syllabus, as follows:

> "Syllabus 2. A tax partly void carries penalties on the valid portion after the date of delinquency, if the valid portion could have been reasonably ascertained and no tender was made."

> "Syllabus 4. Interest upon a delinquent tax is no part of the tax, but is sustainable only as a penalty."

> "Syllabus 6. A taxpayer's tender based upon what he claims is a fair valuation of his property is sufficient to prevent delinquent penalties from accruing, although the courts later fix the correct tax at a different figure but not lower than the amount demanded."

> "Syllabus 7. A penalty attaches only when the obli-

gation is certain or can be made certain by proper calculation."

"Syllabus 8. Suits to enjoin the collection of an excessive tax are equitable in nature, and the court will resort to equitable principles where possible."

The court said that, after examining the many authorities cited, it gathered the following as the established principles:

"That a tax, void entirely, gives no rights and will carry no penalties either by way of interest or otherwise; that a tax valid in part and void in part will carry a penalty either by way of interest or otherwise, to the extent that it is valid, if the amount of the tax which is valid can be reasonably ascertained, and, unless tender is made of the amount legally due, interest and penalties will attach from the date of delinquency; that where the amount of the tax is not devisible or the amount that ought to be paid cannot be readily ascertained, as where the tax is so excessive as to warrant a holding that it is arbitrary and therefore constructively fraudulent as to the excess, the tax is nevertheless legal within the power to tax, and is void only as to the unlawful excess. It is also well established that interest upon a delinquency is no part of a tax. It is sustained only as a penalty to insure prompt payment. People ex rel. v. Peacock, 98 Ill. 172. And this is so whether the penalty be in the way of interest, the addition of a certain per cent., or by doubling the tax. Desty on Taxation, par. 130.

Interest upon delinquent taxes is a penalty, and not interest, within the general acceptance that it is a consideration for the forbearance of money. Evansville v. Terre Haute R. Co. v. West, 139 Ind. 254, 37 N. E. 1009. This principle is most frequently illustrated in that line of cases holding that, where the Legislature passes a law for the taxation of property theretofore omitted as a subject of taxation, it cannot provide for interest from some antecedent date, but must provide some future time within which the tax must be paid after which interest may be demanded. In other words, even the state cannot take

more than the actual tax, whether under the guise of interest or otherwise, until the taxpayer has failed or omitted to perform a duty imposed by law. Where a taxpayer has suffered an excessive assessment, he may tender a sum that he considers to be fair, considering the value of his property and the assessment of other like property. Landes Estate Company v. Clallam County, 19 Wash. 569, 53 Pac. 670. See also, Miller v. Pierce County, 28 Wash. 110, 68 Pac. 358.

By resorting to the record in the main case, we find that relator made a tender, based upon a valuation which it is alleged is consistent with the valuation put upon other like property, which was refused, and which was made good by a tender in court. This, under any theory, ought to satisfy the law, for, if it be the duty of a taxpayer to make tender at all, where a tax is alleged to be fraudulently excessive, a show of willingness, accompanied by tender, is all that can be required, for the actual amount due, being a subject of judicial inquiry, cannot be determined by the taxpayer. It may be greater or less.****

"Suits to enjoin the collection of an excessive tax are equitable, and the courts will resort to the principles of equity wherever it is possible to do so in deciding them. The statutes make no provision for the collection of interest from one who has obtained judgment that his tax was excessive. For a court of equity to impose a penalty in the way of interest, or to hold one who has not wilfully evaded a tax, or who has not failed or refused to pay the lawful tax, but, on the contrary, has insisted upon his legal right to have the amount of his tax legally determined, would be the height of inequity."

State Ex Rel. First Thoughe Mines, Limited, v. Superior Court, 93 Wash., 433, 161 Pac. 77.

THE SUPREME COURT OF THE UNITED STATES HAS ADOPTED THE SAME RULE.

Among the authorities examined and cited by the Washington court was the case of

U. S. Trust Co. v. Territory of New Mexico, 183 U. S. 535.....

The Supreme Court holds:

"Other provisions of this section, taken in connection with a statute passed at the same session of the legislature (chap. 52, p. 106, Laws 1899) referred to by the supreme court of the territory in its opinions, may render it doubtful weather the legislature intended to remove the penalty of 25 per cent interest in respect to this property; for such interest in tax proceedings is in the nature of a penalty. Yet, irrespective of this statutory question, we are of opinion that there was no error in refusing to enforce this charge against the property. The assessment was made in gross upon 60.7 miles of road, without specification of the particular miles, other than that they were 'embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company.' The finding of the court shows that no such length of railroad was subject to taxation, but only 55.5 miles, and those were specified and described. The owners of the road were therefore justified in contesting their liability to such assessment and taxation in gross, and until there was an identification of the property subject to taxation and a determination of the amount of taxes due, it would be inequitable to charge penalties for nonpayment. Lake Shore & M. S. R. Co. v. People, 46 Mich. 193, 211; 9 N. W. 249. Redwood County v. Winona & St. P. Land Co., 40 Minn. 512, 522; 41 N.W. 465. This is not a suit brought by a property holder to restrain the collection of taxes, in which case it would be incumbent upon him to pay, or tender, the amount conceded to be due, but one in which the authorities are the moving party seeking to collect taxes, and in which the liability *in toto* is denied, and the property subject to taxation not fully identified or the amount of taxes determined until the final judgment.

Viewing the proceedings from an equitable standpoint, we see no error in refusing interest prior to the decree. The decree of the Supreme Court of New Mexico is affirmed, each party to pay the costs of its appeal to this court."

The court below should have followed the principle of the above decision, and his failure to do so and the imposition of

said penalty is a clear error.

THE ISSUE AS TO THE VALUE OF APPELLANT'S PROPERTY.

The finding of the court that the value of the property of the Washington Water Power Company for taxation purposes on the second Monday of January, 1918, was $3,620,000 is assigned as error. The appellant maintains that the value as found by the court is too high.

We may premise a discussion of this question by saying to this court that it is not a finding of fact based upon conflicting testimony. It is a finding based solely upon what the court conceived the Public Utilities Commission of Idaho valued this property, and disregards all of the evidences save only the opinion of that commission.

The only testimony with respect to the value of appellant's property was that introduced by appellant. Appellees introduced no testimony in contradiction thereof, but rested their case solely upon the theory that the property of the appellant had been valued by the Public Utilities Commission of Idaho; that the appellant had presented a copy of that opinion to the State Board of Equalization at the hearing in 1918. The position of appellees was stated by their counsel as follows:

> MR. POTTS: We are standing upon this opinion. We have so announced before, and we reiterate it now, admitting that everything in the opinion is correct. I am not going to go any further than that; that is far enough. I admit that the tables in there are accurate and correct and what they purport to speak." R. p. 216.

The opinion of the commission is Exhibit No. 15, page 227 Book of Exhibits.

The theory of the appellees before the trial court was that the sum of $3,800,000 should have been taken as the value of appellant's property based upon said findings. The court rejected that, but adopted the sum of $3,587,500, found in Table 7 of said opinion of the utilities commission (p.270, Book of Ex.).

THE EVIDENCE BEFORE THE STATE BOARD OF EQUALIZATION.

(a) Annual report of the Washington Water Power Co. to its stockholders (Ex. No. 14, p. 222, Book of Ex).

(b) Report of the Washington Water Power Company to the board of equalization, (Exhibit 13. The original exhibit is before the court.)

This report shows in detail the cost and depreciation upon the property of the company. It shows the gross earnings, operating costs and all other facts with reference to the property of the company.

(c) Exhibit No. 16 (Book of Ex. p. 274) is a statement showing date with respect to revenue from the Coeur d'Alene mining district, and that the Idaho taxes equal 12.5 per cent. of the gross revenue. Mr. Simpson, auditor for the appellant, testified with respect to that exhibit (R.p. 193).

(d) The findings of the Public Utilities Commission of Idaho (Ex. 15, Book Ex. p. 227).

The use made of that decision is described in the testimony of John P. Gray (R.p. 205 to 211).

THE EVIDENCE BEFORE THE COURT.

All evidence which was produced before the board of equal-

ization was again presented at the trial, and in addition thereto, the following:

(a) The testimony showing revenue statement of the Washington Water Power Company for the State of Idaho for the years 1911 to 1919, inclusive (Ex. 18); Book of Ex., p. 310 and 311.

(b) A statement of its operating expenses, taxes and depreciation (Ex. 19, Book Ex. p. 310-311).

From the above tables, the percentage earned by the company on a valuation of $2,470,000 was shown to be in

1916 5.2 per cent.

1917 6.3 per cent.

1918 4.3 per cent. (R.p. 198)

(c) A statement showing the revenue and real and personal taxes and percentage of tax to revenue of several thousand operating electric light and power companies as taken from the United States Census Report of 1912. It shows the percentage of taxes to revenue paid in the United States as a whole to have been 3 per cent. In the same table it is shown that the percentage in the State of Idaho paid by appellant in real and personal taxes in said state is 13.4 of its gross revenue (R.p.199, Ex. 20, p. 312 Book of Ex.).

(d) An inventory and valuation of all of the property of the Washington Water Power Company in the State of Idaho as of June 30, 1915, and based upon average prices during five year periods (Plaintiff's Ex. 22. Testimony of Fletcher, who made the inventory and appraisement. R.p. 213 to 218). This was the same inventory which was made for the Public Utili-

ties Commissions of Idaho and Washington by Mr. Fletcher, and contains an inventory of the property of the company based upon actual count of all of the items of property in the state.

(e) An appraisal of the powersites, water rights and flowage rights of the Washington Water Power Company in the State of Idaho by A. J. Wiley, perhaps the most experienced constructing engineer in the Northwest (R.p. 220 to 227).

It may here be stated that the Public Utilities Commission carried into its schedules of values of property of the Washington Water Power Company its water rights, powersites and flowage rights at the sum paid for them. Mr. Wiley's estimates showed that as a matter of fact they were worth really somewhat less than the actual amount paid for them. The testimony, if read, will explain the basis of his calculations and will be found both clear and convincing.

The findings of the court with reference to the value of the Company's property is as follows:

> "The findings of the Public Utilities Commission to which references have already been made are in evidence. By these the defendants are willing to be found, and they insist that under the circumstances these findings are also binding upon the plaintiff. It is pointed out that plaintiff brought the findings to the attention of the Board of Equalization while it had the assessment under consideration, and thus impliedly requested it to accept the conclusions embodied therein. While, therefore, we are without direct evidence of the mental operation of the Board, we have a case where at the time when it was about to take action one of the parties represented that it should follow the determination of the Commission, and

where the other now insists that such determination is correct, and hence impliedly concedes that the Board of Equalization should have accepted and did accept it. In view of these conditions and the further fact that the findings referred to were made by a body invested with the necessary jurisdiction, after an extended hearing in a proceeding the parties to which were the State, through its attorney general, and the defendant, we may reasonably conclude not only that such findings are correct, but that the Board of Equalization, which appears to have made no independent investigation, accepted them as the basis of the assessment. Accordingly it is held that upon the question of the actual value of plaintiff's property in Idaho the Board of Equalization adopted the findings of the Commission.

At the trial the views of counsel were greatly at variance as to just what this finding was. It is to be borne in mind that in its inquiry the Commission was primarily concerned with establishing a valuation not for taxation but for rate-making purposes. Recognizing the fact that the plaintiff's properties in Idaho and Washington were physically connected and inter-dependent, all constituting an indivisible unit, the Commission of the two states co-operated in the hearing referred to, and, having first determined the value of the entire system, apportioned such value to the two jurisdictions. Of course the properties to be considered in establishing rates for electrical service in Idaho are not necessarily identical with those which are subject to taxation in the State. The value of a hydro-electric plant just across the line in Washington, the entire output of which is transmitted for use in Idaho, would be an important factor in fixing reasonable rates for Idaho service, but such plant would be taxable not in Idaho but in Washington. So the ultimate finding of the Commission 'that the present value of the used and useful property of the Washington Water Power Company on the 31st day of December, 1917, used in delivering electrical energy to the citizens of the State of Idaho is the sum of $3,800,000' is irresponsive to the present inquiry. But in reaching this conclusion the Commission made other

findings which are directly in point. It found that on December 31, 1917, the actual value of all the property of the plaintiff, 'both tangible and intangible, used and useful, in the business of furnishing electrical energy,' in both states, was $20,500,000, and of this aggregate amount it finds, in table VII, the value of the property located in Idaho to be $3,587,500.00. Undoubtedly these figures are to be taken as the Commission's findings of the value of the plaintiff's interests in this state. There is no special significance in the coincidence that there is a close correspondence between total actual cost as exhibited in an earlier table and the finding of present value. Allowance must be made for depreciation, it is true, but on the other hand for appreciation also, where the facts warrant. The findings of the Commission are neither equivocal nor inconsistent. It is made clear that the ultimate conclusion of present worth is based exclusively upon no one of the several methods more or less commonly employed for reaching the value of such properties, and further, that the theory of reproduction cost insofar as it was used was not applied without making allowance for depreciation. But other compensating considerations were recognized. For example, water rights, upon which the Commission states it did not deem it necessary to place any specific separate value, but which were taken into consideration in arriving at the final value of the property in Idaho. So with 'going concern value.'

Upon the whole, it is thought the decision is so clear that the Board of Equalization must have understood, and did understand, that the value of that part of the plaintiff's property located in Idaho, and hence subject to taxation here, was found by the Commission to be $3,587,500.00. Admittedly the consideration of the Commission did not extend to the St. Maries lighting system, the value of which the Board may have fairly estimated to be approximately $33,000.00. Adding this to the $3,587,500.00, we have a total of $3,620,500.00 as the actual value of the plaintiff's taxable property in the State. It is thought that the Board of Equalization so found the value to be, but made an assessment for only $2,750,000.

> Accordingly it is held that the assessment complained of was, and by the State Board of Equalization was intended to be, upon a basis of seventy-five per cent of the actual cash value."

The finding is erroneous in the following particulars:

(1) There was other evidence before the Board of Equalization and there is absolutely no evidence in this record, not a scintilla, which shows that the Board of Equalization adopted the valuation which the court assumes it adopted from the findings of the Public Utilities Commission.

(2) The value for rate making purposes and the market value for taxation purposes are two different things;

(3) Consideration should be given and must be given to the earnings in determining the value;

(4) The court did not take into consideration depreciation.

In Idaho, the findings of the Public Utilities Commission with respect to the value of a utility for rate making purposes is not controlling on the State Board of Equalization.

Northwest Light N *Water Co. v. Alexander,* 29 Idaho, 552.

In the first place, how can it be presumed that the Board of Equalization adopted one statement in the commission's opinion and rejected all of the other statements therein and gave no consideration to them? How can it be assumed that they rejected all of the other evidence before the Board of Equalization and disregarded the ability of the property to earn? The view which the court takes is substantially this:

That the opinion of the Public Utilities Commission was presented to the Board of Equalization and used by the counsel

for appellant at the hearing and that therefore it is estopped from questioning any conclusion or statement of the Utilities Commission. The best answer to this is the fact that, as shown by the undisputed testimony, it was used for the purpose of showing the cost of reproduction new of the company's property; the actual cost of the company's property and the Utility Commission's estimate of the depreciation thereof (Test Gray, R.p. 205-208).

The court in its opinion concedes that allowance should be made for depreciation, but it says also for appreciation, where the facts warrant. Little can be said in support of the suggestion that there has been appreciation, when as a matter of fact the average income for the years 1916, 1917 and 1918 was but 5 1-4 per cent on $2,470,000, and on the sum fixed by the court would be under 4 per cent.

The court also suggests that the commission did not deem it necessary to place any specific separate value on water rights, but that they were taken into consideration in arriving at the final value of the property in Idaho. Mr. Wiley's testimony shows that the value of those water rights does not exceed in value the cost thereof, as shown in Tables 1 (p. 249) and 2 (p. 253).

The court also mentions "going concern value." The commission itself said it was not inclined to allow any large amount to be capitalized to cover that feature.

WHAT DID THE COMMISSION FIND?

(a) Actual cost: The actual cost of the company's prop-

erty as shown by Table 1 (p. 249) amounted to the sum of $20,404,474, from which was deducted $906,908 for property held by the commission to be ninoperating property and to which was added $31,000 for franchises, leaving a total actual original cost of $19,500,000.00 for the property which was held to be used and useful.

The cost of reproduction as shown in Table 1, page 249, and found by the commission, page 254, based upon unit prices for a period of five years preceding December 31, 1916, was $20,228,593, a little in excess of the actual cost.

(c) Depreciated value: The estimated past depreciation based upon the cost of reproduction, less such depreciation, is shown on Table 2, page 253, and as so found by the commission, the depreciated value of the property in Idaho on December 31, 1917, on unit prices for five years preceding December 31, 1915, was $2,442,834, and on unit prices for five years preceding December 31, 1916, $2,543,385. Of that sum, in Idaho $42,586 was nonoperating property, leaving the depreciated value the sum of from $2,400,000 to $2,500,000.

These figures were all before the Board of Equalization and were used by the appellant.

CONCLUSION OF THE PUBLIC UTILITIES COMMISSION.

The Public Utilities Commission called attention to the fact:

(1) That the hydro-electric plants of appellant in Washington and Idaho were interconnected;

(2) That one plant is situated in Idaho and that its produc-

tion was not sufficient to meet the demand in the State of Idaho;

(3) That certain flowage lands permitting the storage of waters in Lake Coeur d'Alene increased the electrical horse power which could be generated by appellants by 19,630 horse power, of which 17,150 was in the State of Washington. (Mr. Wiley estimated the value of their water rights, based upon the added horse power both in Idaho and in Washington).

The commission then reached a conclusion that the value of the property of the company in the two states was $20,500,000, within $230,000 more than the cost of reproduction new, and only 63,000 more than the actual cost of the property of the company before deducting an obsolete steam plant at Spokane, an obsolete steam plant at Colfax and certain other nonoperating property.

Various methods were then discussed for distributing that property, all of which are referred to on pages 268 to 270 of the record. The fact is that that sum of $20,500,000 apportioned in accordance with the value of the physical properties located in each state under Table 7 showed that it was the opinion of the Utilities Commission that $3,587,500 should be apportioned to Idaho.

Without a consideration of the evidence showing the actual value, in the absence of any evidence showing any appreciation, in the absence of any evidence that that figure was accepted or taken by the Board of Equalization, the court adopts it as the value of the company's property, and adopts it as the value

which the court assumes the Board of Equalization took as the value of the company's property.

THE VALUE OF THE PROPERTY FOR RATE MAKING PURPOSES AND THE VALUE FOR TAXATION PURPOSES.

The value for these two purposes certainly is distinct. In determining the value of the property for rate making purposes, it requires no citation of authority to show that commissions take into consideration the cost of the property, the cost of its reproduction and other such items and give no consideration to the value of the property from the standpoint of its market value or of its earnings.

It is a further fact which requires no citation of authorities that the value of a plant upon which it really is entitled to earn frequently is far less than that value because it cannot make such earning as to make it an attractive investment for any one.

In fixing the value for rate making, no consideration is given to the market value of the property, no consideration is given to the value of the property based upon earnings. But when you come to determine what a property can be sold for, what it really is worth upon the market, those are factors which no respect to that plant, depreciation. The reproduction cost of that plant as shown by our own figures is $43,000, and its depreciated value on the second Monday of January, 1918, was $31,460. This was shown by the testimony of Simpson and Fletcher.

But the court did not deduct the item of nonoperating prop-

erty, 42,586, in Idaho from those figures. That is shown in Table 2, page 253. Taxes were paid upon this under an assessment by a local assessor.

The depreciated value of the Idaho property was from $2,400,000 to $2,500,000. Without a scrap of evidence to justify it, the court assumes that the appreciation in value of this property, its going concern value and other such intangibles is represented by an additional million and more dollars upon which we must pay taxes. Upon the valuation placed by the court this company earns a little over 3 per cent. The court takes simply without investigation the figures of the Utilities Commission upon which we ought under their finding to earn.

taxing board and no court can disregard. If as a matter of fact, and such is not the fact, in these days a utility could actually earn a fair return upon its value, then its value for taxation might approximate its value for rate making.

In this case, however, it is perfectly evident that this utility is not earning, upon a valuation such as that found by the court, anything approaching a fair return. The very fact that over 13 per cent of its gross income in Idaho is paid in real and personal taxes in said state shows upon its face that there is something wrong with the basis of taxation. Compare it as shown in plaintiff's Ex. 20 (Book of Ex. p. 312) with the taxes which are paid by other operating electric light and power properties in the United States. They on the whole pay an average of 3 per cent of their gross earnings, varying in differ-

ent geographic divisions from .7 ped cent to 4.4 per cent, while the Washington Water Power Co. pays 13.4 per cent.

In order to work out the 75 per cent theory of the court below, he had to assume not only that the Board of Equalization took the figure of $3,587,500, but that it must have assumed that the St. Maries distributing system was worth $33,000. There was no evidence that the board did any such thing. But in doing so the court below did take into consideration, with

It is a well known fact that commissions in these days are undertaking to fix values which approximate the actual cost of reproduction new when it comes to valuating utilities for the purpose of fixing rates, and they are giving little consideration to the so-called "intangible" values which utilities have sought to capitalize at high figures in order to get high returns.

We assert that under the evidence in this case the court failed to give due or any consideration to depreciatoin. He simply assumes that appreciation far exceeds depreciation.

The truth is that the court does not give consideration to the evidence of actual value. His decision is based upon the theory that because the opinion and findings of the Public Utilities Commission were presented to the Board of Equalization for a certain purpose that they were asked to accept the figure of $3,587,500 shown in Table 7 by the appellant and that it is estopped from showing what the actual value is.

The evidence does not support any such conclusion. That opinion was used for the purpose of showing the actual cost; the cost of production new and the depreciated value. The

fact is, as shown by the testimony of Mr. Gray, that the only figure that the oBard of Equalization seemed to be concerned with was the arbitrary figure of $3,800,000, shown on page 271, which was the figure taken by the commission as that upon which the company was entitled to earn in Idaho.

It is settled that depreciation must be allowed.

Knoxville v. Knoxville Water Co., 212 U. S. 1

On pages 9 and 10 of the opinion in the above case, the court said

> "The cost of reproduction is one way of ascertaining the present value of a plant like that of a water power company, but the test would lead to obviously incorrect results if the cost of reproduction is not diminished by the depreciation which has come from age and use.****The cost of reproduction is not always a fair measure of the present value of a plant which has been in use for many years. The items composing the plant depreciate in value from year to year in a varying degree. Some pieces of property, like real estate for instance, depreciates not at all, and sometimes, on the other hand, appreciates in value. But the reservoirs, the mains, the service pipes, structures upon real estate, standpipes, pumps, boilers, meters, tools and appliances of every kind begin to depreciate with more or less rapidity from the moment of their first use. It is not easy to fix at any given time the amount of depreciation of a plant whose component parts are of different ages, with different expectation of life. But it is clear that some substantial allowance for depreciation ought to have been made in this case."

In

National Lbr. Co. v. Chehalis County, Wash., 150 Pac. 1164

there was involved the correctness of an assessment upon the sawmill plant. The assessor adopted the depreciated value of

the plant as found by appraisal. The sawmill company thought that even too high and claimed that the depreciated value of the machinery was not the same as its true or market value, and that its true or market value was even less than its depreciated value. The court there said:

> "Finding the new replacement value, and then deducting from this the amount of the depreciation, is one way of finding the actual value. The new replacement value, less the depreciation, would give the depreciated value. San Joaquin, etc., Irrigation Co., v. Stanislaus County (C. C.) 191 Fed. 875; Knoxville v. Knoxville Water Co., 212 U. S. 1, 29 Sup Ct. 148, 53 L.Ed. 371. These cases it is true, are not tax cases. But, if the depreciated value is the measure of the actual value of the plants under consideration in those cases, there does not appear to be any reason why it should not be the measure of the actual or market value in the present case. We do not want to be understood as holding that the depreciated value is a universal standard of actual or market value. We only hold that, under the facts in the present case, the two standards are substantially co-ordinate."

Judge Morrow in

San Joaquin & Kings River C. &R. Co. v. Stanislaus County,

191 Fed. 875 held:

> "In ascertaining the value of a large irrigation plant for the purpose of determfining the reasonableness of water rates fixed by public authority to be charged for service from such plant, as fair a rule as can be formulated is to find the cost of reproduction as of the date of the use in question, and deduct therefrom the depreciation that has resulted from age and use."

In the Minnesota Rate Case,

Simpson v. Sherard, 230 U. S. 350

Judge Hughes said on page 458:

> "And when particular physical items are estimated as worth so much new, if in fact they be depreciated, this amount should be found and allowed for. If this is not done, the physical valuation is manifestly incomplete. And it must be regarded as incomplete in this case. Knoxville v. Knoxville Water Co., 212 U. S. 1, 53 L. ed. 371, 378, 29 sup. Ct. Rep. 148."

We urge that consideration must be given to depreciation in arriving at the actual cash value of such a plant for taxation purposes. It would be taken into consideration by an individual contemplating a purchase. An individual contemplating the purchase of this property would certainly consider its earnings and it is perfectly absurd to think that he would only consider a valuation for rate making purposes made by a commission.

For the reason that the court did not take into consideration the actual market value based upon earnings; did not duly allow for depreciation and for the reason that the evidence shows that the property was not worth the amount so found by the court, we assert that in this particular his judgment should be reversed. Here again by course of rough and ready reasoning the appellant is denied the relief to which it was entitled.

Respectfully Submitted

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